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No. 877

In the

Supreme Court of the United States

OCTOBER TERM 19

DOWELL INC. and PHILLIPS PETROLEUM COMPANY,
Petitioners,

v.

J. J. TYLER and HERMAN KING, d/b/a KING DRILLING COMPANY, MERCHANTS FIRE ASSURANCE CORPORATION, GUARANTY MUTUAL INSURANCE COMPANY and STANDARD ACCIDENT INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS PRAY that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit, entered herein January 14, 1960, Petition for Rehearing denied February 10, 1960.

OPINION BELOW

The opinion of the Court of Appeals (Proceedings in Ct. of App. 3) is reported in 274 F. 2d 890.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1960 (Proc. 22), and Petition for Rehearing, filed on February 1, 1960 (Proc. 23), was denied on February 10, 1960 (Proc. 28). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether judgment of a U. S. District Court should be reversed for failure to give Plaintiffs' requested instructions singling out each of their alleged grounds of negligence, the charge as a whole being fair and adequate.

2. Whether Defendants were entitled to instructed verdict under the assumption of risk and hold-harmless provisions of the contract between King Drilling Company and Phillips, and the indemnity provisions of the contract between Phillips and Dowell.

STATEMENT

Plaintiffs brought suit against Dowell for $335,000.00 for drilling equipment destroyed in an oil field fire, and $2,500.00 for personal injuries, basing federal jurisdiction on diversity of citizenship. Phillips was brought in as a third party defendant. King Drilling Company was drilling a well for Phillips in New Mexico, and at the time of the fire a fracking operation by Dowell was being completed. The contract of King with Phillips provided that

King assumed all risk to its equipment, except subsurface equipment not here involved, and agreed to hold Phillips harmless from any liability (R. 666, 669). Phillips in its contract with Dowell agreed to hold Dowell harmless from liability (R. 674, 677). Defendants by motion for directed verdict (R. 455, 576) contended that Dowell was a third party beneficiary of the assumption of risk by King, and that recovery was barred by circuity of liability.

The evidence was conflicting as to whose negligence, if any, caused the fire, there being testimony indicating that King was negligent in having its remote control for the blow-out preventer too near the well head (R. 352-353, 288, 289, 324, 325, etc.). There is likewise substantial evidence that the fire was not caused by Dowell's ball truck, as Plaintiffs claimed (R. 472-474, 475-476, 486-487), and that it might well have been started by static electricity (R. 400, 402-403, 476-478). There was also evidence that the nipple which failed broke from metal fatigue and not from pressure (R. 405, 459), and the failure therefrom could neither be foretold nor discovered in advance (R. 459, 461, 463).

The jury brought in its verdict in favor of Defendants (R. 72). Accordingly, judgment was entered in the District Court for Defendants (R. 72). The Court of Appeals reversed and remanded the cause because of the failure of the trial court to give Plaintiffs' requested instructions reiterating their alleged grounds of negligence (Proc. 3).[1]

[1]The opinion commented on other matters, since the case was being remanded on this ground, but did not base its reversal on them, and it is clear that they do not present reversible error.

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In reversing because of failure to give Plaintiffs' requested instructions singling out each of their alleged grounds of negligence, the charge as a whole being fair and adequate and such specification being unnecessary.

(2) In reversing although the requested instructions were themselves erroneous and there was no probable harm.

(3) In failing to hold that Defendants were entitled to instructed verdict under the contracts involved.

(4) In reversing the cause although it had been fully and thoroughly tried at length without prejudicial error and the verdict and judgment were amply supported by the record.

REASONS FOR GRANTING THE WRIT

1. The matter here presented is of importance in the administration of justice in the Federal Courts, in that the reversal by the Court of Appeals presents an infringement upon the proper and traditional role of the trial court. This Honorable Court has always been diligent, and particularly in recent years, in protecting the discretion of trial jury and trial judge in their respective spheres against encroachment by appellate courts through substitution of their own judgment for that of the jury or judge below. When a trial court has correctly and fairly charged the jury as to the law controlling its deliberations, the extent of its amplification by particularization as to the grounds of negligence

alleged by each party is and should be a matter within the discretion of the trial court.

The Court of Appeals here recognized that the trial court had correctly defined and given the effect of negligence, contributory negligence, proximate cause, unavoidable accident and the like, and properly instructed as to the burden of proof, but its own preference was for a charge going beyond instructions on the applicable law to discuss specifically the individual factual grounds of negligence relied upon by the parties. While it might be proper for the trial court to so charge in factual detail, it is not bound to do so. The cause should not be reversed merely because the trial judge has not exercised his discretion in the same way that the justices of the Court of Appeals might have if they had been trying the case.

2. The decision of the Court of Appeals here is in conflict with *Gibson v. Lockheed Aircraft Service, 350 U. S. 356, 100 L. Ed. 395 (1956)*, holding that a general charge and instruction constituted sufficient statement of the theories of the parties without presenting individually the specific factual grounds of negligence alleged, even though expressly requested by a party to give such special instructions. It also directly conflicts with *Walker v. Warehouse Transportation Co., 235 F. 2d 125 (1st Cir.)*, and the holding of *Western Produce Co. v. Folliard, 93 F. 2d 588 (5th Cir.)*, that "There is no rule requiring the Court to refer to each allegation of negligence and to direct the jury either to consider or disregard it." It further conflicts in principle with the many other cases discussed below.

3. The reversal by the Court of Appeals because of the failure to give instructions singling out each of the specific acts or omissions of negligence claimed by Plaintiffs is erroneous because the charge given adequately and fairly put the case before the jury and allowed them to consider all of the grounds of negligence pleaded, without specifically repeating them; because the failure to give the requested instructions did not result in probable harm, since they would not have been of any aid to the jury in its deliberations; because the trial court was well within its discretion in considering that further particularization as to the grounds of negligence was not necessary; and because the requested instructions themselves were improper and erroneous and could not be given without qualification or modification. The Court of Appeals also erred in reversing because of the wording of the charge when Defendants under the record were entitled to a directed verdict on the basis of the hold-harmless and indemnity agreements.

A. The Trial Court Committed No Reversible Error in Failing to Give Plaintiffs' Requested Instruction Singling Out Each of Their Alleged Grounds of Negligence, the Charge as a Whole Being Fair and Adequate

The Court of Appeals reversed because of failure of the trial court to give Plaintiffs' Requested Instructions 1-12 and 22 (R. 577-580, 584). Each of those instructions first sets forth one of the specific acts or om sions claimed by Plaintiffs, then states that if the jury found such act or omission took place, stating it again, and that it was negli-

gence and a proximate cause, the verdict must be in favor of Plaintiffs. The charge given properly and adequately defines and gives the effect of negligence, contributory negligence, proximate cause, and unavoidable accident and instructs as to the burden of proof; properly instructs that the fact that a nipple broke and a fire ensued does not in itself infer negligence; that evidence of custom or general practice is not conclusive on the question of negligence, so that acting according to industry custom would not necessarily acquit Dowell of negligence; and that the evidence is undisputed that the employees of Dowell were in the course of their employment and any negligence on their part was chargeable to Dowell.

It is clear that all of the grounds of negligence asserted, to the extent that they were supported by evidence, were placed within the consideration of the jury under the definitions and instructions given and that the jury was not barred from considering any of them. Of course, Plaintiffs' pleadings setting forth these grounds were read to the jury, and the charge did expressly refer the jury to the "averments of negligence, as alleged in the Complaint," and instruct them that if they found Dowell was "guilty of negligence, as charged in some part of the Complaint" they should find for the Plaintiffs (R. 602). Thus, the charge does direct the attention of the jury to the averments of negligence made in the Complaint and does not eliminate any of them from the jury's consideration. Plaintiff's counsel was allowed to, and did, argue every one of those individual averments of negligence to the jury. The complaint

is merely that the charge did not single out each factual ground and remind the jury of it.

However, as stated in *Cyclopedia of Federal Procedure, Section 31.88:*

> "The court is not required to refer to each allegation of negligence and direct the jury either to consider or disregard it."

Thus *Western Produce Co. v. Folliard, 93 F. 2d 588,* declares:

> "There is no rule requiring the court to refer to each allegation of negligence and to direct the jury either to consider or disregard it."

None of the cases cited by the Court of Appeals hold that a court must give specific instructions directing attention to each of a long list of allegations of negligence. The cases on the propriety of instruction upon a party's theory of his case are not applicable here. Plaintiff's theory was that Dowell was negligent in performance of the fracking operation and that its negligence caused the fire. The individual acts and omissions are not separate theories of the case but merely the specific grounds of negligence.

The *Folliard* case was cited with approval in *Messer v. L. B. Foster Co., 254 F. 2d 412 (1958),* where the court refused to reverse for failure to submit a proposed charge setting forth appellant's specific theory of concurrent negligence. It recognized that this theory was substantively

correct but held that the failure to charge in the terms requested did not compel reversal:

> "If it was error, that error must have been harmful, F. R. C. P. 61, and it may not be deemed error if the charge otherwise adequately instructs on the controlling principles."

Walker v. Warehouse Transportation Co., 235 F. 2d 125 (1956), is directly in point. There plaintiff claimed it was error to fail to instruct with regard to his specific claims of negligence, including failure to keep proper lookout, failure to apply brakes, failure to turn left, failure to sound horn, etc. It was held that since the court correctly charged the jury in a general way concerning defendant's duty to exercise due care, failure to give the more specific charges as to the alleged grounds of negligence was not reversible.

> "Plaintiff contends that although the trial judge correctly charged the jury in a general way concerning defendant's duty to exercise due care, failure to give the more specific charges relating directly to bits of evidence in this case constitutes reversible error. We do not agree. We think this aspect of the appeal is governed by the rule expressed in Dane v. MacGregor, 1947, 94 N.H. 294, 299, 52 A. 2d 290, 293, where the court said:
>
> > "' • • • The charge need not discuss all the specific items of evidence; it deals with issues and the rules of law necessary for their proper determination. What evidence need be pointed out for a proper understanding of the issues may ordinarily be left to the Trial Judge. "The extent to which rules of law shall be given specific application to the claims of the parties and the facts disclosed by the evidence in a given case must be left to the sound discretion of the trial court, pro-

> vided the jury is 'fully and correctly' instructed." Colby v. Lee, 83 N. H. 303, 310, 142 A. 115, 688.'"

Currier v. Ingram, 75 F. 2d 783, holds that, where the charge on negligence and contributory negligence was clear and explicit and defendant's counsel was permitted to argue all evidence bearing on contributory negligence, the refusal of his requested instruction as to the negligence of plaintiff in a particular respect (not having a man at the rear of the parked truck to warn traffic) was not prejudicial. That holding is clearly applicable here, for in both cases the charge correctly defined negligence and made plain the effect of contributory negligence, and whether the failure in the particulars set forth in the requested instructions constitute negligence depended on other facts and circumstances not referred to therein. It is stated:

> "To have specifically instructed the jury that it might find from the evidence that the plaintiff was negligent in not having stationed a man at the rear of the truck * * * would have resulted in giving greater effect in the minds of the jury to a single piece of evidence than the circumstances warranted."

It was also pointed out that, "The requested instruction could not have aided the jury in determining this issue."

This Court in *Union Pacific Railroad v. Hadley, 246 U. S. 330, 62 L. Ed. 751*, states through Justice Holmes:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each."

It was held that there was no right to a splitting up of the instructions to the jury into the separate grounds and that

> "The court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately."

In *Gibson v. Lockheed Aircraft Service, 350 U. S. 356, 100 L. Ed. 395 (1956)*, this Court reversed the Court of Appeals for the 5th Circuit for doing what the Court of Appeals has done here. The Court of Appeals, *217 F. 2d 730*, had reversed and remanded because of failure of the trial court to give requested instructions "each of which submitted for the jury's determination whether specifically claimed failures to exercise due care, as to which there was evidence, were shown there, as to each of them, whether if the failure occurred, it was a proximate cause of the crash and injury." The Court recognized that "the District Judge did indeed properly and fully state to the jury the theories of defendant as set out in its pleadings" by means of the general charge and instructions but failed to present these specific grounds of negligence, "though specifically requested by defendant in special instructions to do so." This Court then reversed the reversal, declaring that the charge as given by the trial court was both complete and correct and that there was no error in refusing the requested instructions as to specific grounds of negligence.

It is declared in *Gaillard v. Boynton, 70 F. 2d 552:*

> "Where a charge as given is fair and presents fully to the jury the issues in the cause, the denial of re-

> quests involving unnecessary and further particularization is not error. We think the trial court's charge did in this case, on the matter of defendant's liability, fairly and with reasonable fullness place before the jury the issues upon which they were to pass. When such is the case, it is not the desire of this court to give unnecessary encouragement to the practice of insisting that the trial court at the conclusion of an adequate charge read, or orally state, to the jury a series of detached and uncoordinated specific instructions. Such a practice is more likely to confuse than to assist the jury in their deliberations."

Likewise, the trial court here was well within its proper discretion in concluding that further particularization was not necessary.

In *United Staes v. Bayer, 331 U. S. 532, 91 L. Ed. 1654*, this Court said:

> "Once the Judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion."

This is quoted in *Southern Pacific Co. v. Souza, 179 F. 2d 691*, and again in *Chicago, Rock Island & Pacific R. Co. v. Emery, 233 F. 2d 850*, which goes on to say:

> "The brevity or conciseness of a correct and adequate charge to a jury or a refusal to amplify that which is clearly implicit in the court's instructions does not constitute reversible error."

Plaintiffs here sought merely amplification, by specific references to each individual allegation of negligence, of what was implicit in the charge given.

As this Court put it in *Railway Company v. McCarthy, 96 U. S. 258, 24 L. Ed. 693:*

> "It has been repeatedly determined by this tribunal that no court is bound to give instructions in the forms and language in which they are asked. If those given sufficiently cover the case, and are correct, the judgment will not be disturbed, whatever those may have been which were refused."

Southern Pacific Co. v. Guthrie, 180 F. 2d 295, followed *186 F. 2d 926, cert. den. 341 U. S. 904, 95 L. Ed. 1343,* holds it not error to decline requested instructions even though they might properly have been added to the charge where they "add no essential feature to the charge given." The charge there correctly defined negligence and stated the effect of contributory negligence and told the jury to exclude sympathy, as in the present case; it advised as to the application of comparative negligence, as the court here advised that it did not apply, and indeed gave a charge very similar in its entirety to that in the present case, as shown in its elements as set forth in Footnote 4, p. 301 of the opinion. It is held that "The court's charge to the jury, although brief, covered the issues to be determined," citing *Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403.*

Thiringer v. Barlow, 205 F. 2d 476, states:

> "Complaint is made that the court refused to give the jury certain requested instructions. The court instructed the jury with commendable clarity and correctness upon the material issues in the case. * * *

> And this court has held without deviation that it is not prejudicial error to refuse to give a requested instruction, even though it be an accurate statement of law, if the issues have been fairly and correctly covered in the *general* instructions given."

As stated in *Felter v. Delaware & Hudson Railroad, 19 F. S. 852:*

> "To instruct a jury that upon certain facts the verdict must be for one party or the other is dangerous, in that it may be accepted by the jury as a direction to find in favor of one of the parties."

This language is quoted with approval in *Schwartz v. Myrden, 160 F. 2d 678.*

If the court had given the requested instructions as to all of the individual grounds of negligence it would also have had to give such instructions as to each ground of contributory negligence asserted by Defendants, and here it properly chose to do ~~either~~ neither.

In *Rio Grande Western Ry. v. Leak, 163 U. S. 280, 41 L. Ed. 160,* defendant requested instruction that if plaintiff saw the cars coming and knew there was danger of collision, or should have, in time to escape by leaving his wagon and remained in the wagon, then the jury should not return a verdict for plaintiff. This Court held that it was not error to refuse this instruction which singled out particular circumstances and omitted all reference to others, and that the jury could consider the evidence on such matters under

the general direction to look at all the circumstances in determining whether plaintiff was injured without negligence on his part, the general instructions to such effect being sufficient:

> "It was not an error to refuse this instruction. It was liable to the objection that it singled out particular circumstances and omitted all reference to others of importance. In Grand Trunk R. Co. v. Ives, 144 U. S. 408, 433 (36:485, 494), it was said that 'in determining whether the deceased was guilty of contributory negligence, the jury were bound to consider *all* the facts and circumstances bearing upon that question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others.' If the question of the ability of the plaintiff to have escaped personal injury 'by leaving his wagon' was involved in the issue as contributory negligence, the jury were entitled to consider the evidence relating to that matter under the general direction to look at all the circumstances in determining whether the plaintiff was injured without fault or negligence on his part. The charge upon that subject was ample for all the purposes of a fair trial, and no injustice was done to the defendant by the refusal of the court to single out the fact that the plaintiff did not jump from or leave his wagon as the defendant's train approached, and take the chances of being personally injured in that way."

Looking to the charge as a whole, it correctly and fairly instructed the jury as to all applicable principles of law necessary for determination of the case and permitted proper consideration of the contentions of both sides, and that is all that is required.

B. The Failure to Give Plaintiffs' Requested Instructions Could Not Constitute Reversible Error, Since Those Instructions Were Themselves Incorrect and Since There Was No Probable Harm

The instructions requested added no principles of law and indeed made no application of law to facts in any way as to give any further guidance at all to the jury, and thus no harm is shown from their refusal. It is well settled that error in instructions will not be cause for reversal unless it is shown that the interests of appellant have been prejudiced thereby and that the jury has been led to an erroneous verdict. This Court so holds in *Holloway v. Dunham, 170 U. S. 615, 43 L. Ed. 1165.* In accord are *Employers Mutual Cas. Co. v. Johnson, 201 F. 2d 153; Employers Liability Assurance Corp. v. Freeman, 229 F. 2d 547; Hoag v. Detroit, 185 F. 2d 764; Dallas Ry. & Terminal Co. v. Sullivan, 108 F. 2d 581;* etc.

Rule 61, F. R. C. P., makes plain that no such error is reversible unless it has resulted in harm and the denial of substantial justice, which is not shown here from the mere refusal to reiterate the specific allegations of negligence. As stated in *Tyson-Long Company v. Wolfe, 81 F. 2d 82:*

> "It is clear that the charge to the jury, as given, while not as illuminating as it might have been, nevertheless stated the issues of law which were raised by the evidence. It would have been better to elaborate more, outline the issues, and discuss the evidence bearing thereon more fully than was done. In our view of the facts of this case, however, this was not prejudicial error."

The instructions here would not have given any aid to the jury in determining whether the specific grounds were negligence proximately causing the fire but merely sought to emphasize those grounds by repeating each twice in each instruction without giving any more guidance than provided by the definitions and instructions of the charge in general.

Of course, contention on appeal that a special requested instruction should have been given fails if the requested charge was erroneous. *Guerini Stone Co. v. P. J. Carlin Constr. Co., 240 U. S. 264, 60 L. Ed. 638; Cherry v. Stedman, 259 F. 2d 774 (1958); Travelers Indemnity Co. v. Bengston, 231 F. 2d 263; Lumberman's Mutual Cas. Co. v. Hutchins, 188 F. 2d 214; Chicago G. W. R. Co. v. Robinson, 101 F. 2d 994* ("It is the rule in federal courts that 'A party cannot assign for error the refusal of an instruction to which he has not a right to the full extent as stated, and in its precise terms; the court is not bound to give a modified instruction varying from the one prayed.' *Catts v. Phalen, 2 How. 376, 382, 43 U. S. 374, 381, 11 L. Ed. 306.")*; Hawbaker v. Danner, 226 F. 2d 843; Nesbitt v. Everette, 243 F. 2d 59;* etc. It is held that it is not reversible error to decline a special instruction unless it is strictly accurate in every respect. *Knoxville v. Bailey, 222 F. 2d 520; Southern Ry. v. Jones, 228 F. 2d 203.*

The rule is stated in *88 C. J. S., Sec. 408*, as follows:

> "Since the form and substance of a requested instruction must be such that the court may properly charge a jury in the terms of the request, without qualification or modification, * * * the court is not

> required to grant requests for instructions which need explanation, qualification or modification * * *. The rule is that the court is not bound to correct, modify or qualify erroneous requested instructions or give any others in their place."

All of the requested instructions were erroneous in that each states that, if the jury finds a certain act or omission and that such was negligence and a proximate cause, then the verdict "must be in favor of the plaintiffs and against the defendant Dowell, Inc." Such peremptory or binding instructions are incorrect in that they fail to take into account the negation of contributory negligence, as pointed out in *Shell Pipeline Co. v. Robinson, 66 F. 2d 861*, where it is held that an instruction without qualification that if defendant is found guilty of negligence proximately causing the injuries the verdict should be for plaintiff is erroneous in wholly ignoring the defense of contributory negligence and that the error was not cured by subsequent instruction on contributory negligence.

Each instruction requested here directed the jury that if it found a certain ground of negligence proximately causing the fire its verdict must be for Plaintiffs and against Dowell, omitting all the other elements in the case. They were thus similar to the instruction requested in *Walton v. Owens, 244 F. 2d 383 (1957)*, which would have required the jury to return a verdict for plaintiff and against defendant if it found that plaintiff entered the intersection first, making no provision for the further element of right-of-way as to one approaching so closely as to constitute an immediate hazard. It was held that there was

no error in refusing the instruction and that it did not constitute an exception or objection to the charge as a whole: "There was therefore no error in refusing it as such, and being itself imperfect, it is ineffectual as an exception or a statement of reasons, *F. R. C. P. 51*, to the charge as a whole, *Travelers Indemnity Co. v. Bengston, 5 Cir., 231 F. 2d 263.*"

The decision of the Court of Appeals here was contrary to the spirit and intent, as well as the letter, of both *Rule 51* and *Rule 61*.

The objections and exceptions to the failure to give the instructions here involved are merely part of a blanket objection and exception to the failure to give "their Requested Instructions numbered 1 to 16, 19, 20, 21, 22, 25 and 26" (R. 599). A general exception to the refusal of a number of requests for instructions is not well taken if any were properly refused. *Union Pacific Ry. v. Callaghan, 161 U. S. 91, 40 L. Ed. 628; Bogk v. Gassert, 149 U. S. 17, 37 L. Ed. 631; Morgan v. U. S., 159 F. 242*; etc.

As we have seen, the requests as to specific grounds of negligence were in themselves defective. Moreover, other requests covered by the blanket objection and exception were likewise improper. Thus, No. 26 seeks an instruction that the measure of damages as to property damaged or destroyed is the market value at the time and place; this might be the measure as to property destroyed but certainly not as to property damaged.

It is clear that there was no reversible error in connection with the charge properly preserved by Respondents.

C. Judgment For Defendants Should Have Been Affirmed Since They Were Entitled to a Directed Verdict

If there were any error in the charge it would have been harmless and immaterial, since Defendants were entitled to judgment upon their Motion for Directed Verdict. It is well settled that any errors in connection with the charge, admission or exclusion of evidence, or the like are not prejudicial to plaintiff when verdict should have been directed for defendant. *Nalbantian v. U. S., 54 Fed. 63, cert. den. 285 U. S. 536, 76 L. Ed. 930; Weidenfeld v. Pacific Imp. Co., 43 F. 2d 817, cert. den. 283 U. S. 890, 75 L. Ed. 784; Petersen v. Wellsville City, 14 F. 2d 38; Sterling Aluminum Products v. Shell Oil Co., 140 F. 2d 801; McLean v. Donoghue Transportation Co., 97 F. 2d 356;* etc.

Dowell moved for instructed verdict, and its motion was joined in by Phillips, upon the grounds that under the contract of King Drilling Company with Phillips it agreed to bear the risk of all loss to its equipment here involved and that Dowell is a third party beneficiary of that agreement; and that under the contract between Phillips and Dowell, Phillips agreed to indemnify Dowell for any loss or liability in connection with the operations here, so that in the event of any liability of Dowell to King, Dowell would be entitled to indemnity from Phillips, and Phillips in turn would be entitled to be indemnified by King under its contract with them, so that because of this circuity of rights and relief King would be barred from any recovery

(R. 455-456). This motion was renewed at the close of all of the testimony (R. 576).

The drilling contract with Phillips (R. 660-671) bound King to "assume and bear all risk of accidents and damages to persons and property which may occur in the course of contractor's operations hereunder and to indemnify and hold owner harmless against or on account of all such accidents and damages" (Art. II, Paragraph 7 w), and provided that "All risk and damage to drilling tools, machinery, appliances, derrick or equipment from whatever causes shall be at all times assumed and borne by contractor except owner agrees to reimburse contractor actual value for loss of contractor's drilling pipe and other subsurface drilling tools and equipment occurring while in the performance of day work hereunder from causes other than negligence on the part of contractor." (Art. IV, Paragraph 6.)

The Court of Appeals recognized that King did thereby assume the risk or loss or damage to its equipment as between King and Phillips even if caused by the negligence of Phillips, but held that Dowell was not entitled to protection as a third party beneficiary. The opinion does recognize that "the drilling contract did contemplate that third parties would perform specialized services," but gives no weight to that fact. Since such contracts for specialized services customarily contain provisions holding harmless the special service contractor as did the one between Phillips and Dowell here, it is submitted that it is fairly to be inferred that Phillips, in specifically referring in the drilling contract (Art. 3, Sec. 21) to the fact that special-

ized third party services are to be performed during its course, did intend such third parties to be third party beneficiaries, not so much for the altruistic purpose of insulating such special service contractors from liability for their own benefit, but rather to protect Phillips itself from its possible and probable hold-harmless agreements with such special service contractors.

Hammill v. Maryland Cas. Co., 209 F. 2d 338, a 10th Circuit case from New Mexico, makes it clear that Dowell is entitled to protection as a third party beneficiary of the agreement between Phillips and King in laying down the following rules:

(1) The rights of a third party beneficiary depend upon the intent, which need not be mutual between the contracting parties, but: "Instead, it is the intent or purpose of the promisee who pays for the promise that has been generally looked upon as governing. * * * If an intent can legitimately be found to give a third party a right, the intent should be given effect." Under this rule, Phillips' intent to protect the special service contractors in taking the assumption of risk agreement from King would be controlling, whether King intended to protect them or not. The intent of Phillips to have the risk of loss clause enure to the benefit of Dowell is apparent from the drilling contract itself which points out specifically that specialized third party services are to be performed during the course of the drilling contract.

(2) Even more important here is the second rule, given as follows: "Otherwise stated, if the performance of the

promise will satisfy an actual or a supposed or asserted duty of the promisee to the beneficiary, he is a creditor beneficiary and may enforce the promise." Here enforcement of the assumption of risk contract between Phillips and King would clearly satisfy the duty of Phillips under its indemnity contract with Dowell. Under this language, it does not matter whether the Dowell contract was valid and enforceable or not, since it is sufficient if the duty was either "actual" or "supposed" or "asserted".

The *Hammill* case is approved in *Coleman v. Mountain Mesa Uranium Corp., 240 F. 2d 12 (1956).*

Since assumption of the risk by King would protect Phillips in its dealings with its special service contractors, it is clear that at least one of Phillips' purposes in taking such a contract would be to accomplish that very end. See also *Southwestern Portland Cement Co. v. Williams, 251 P. 380 (N. M.); Rankin v. Ridge, 20 P. 2d 359 (N. M.); Johnson v. Armstrong and Armstrong, 66 P. 2d 992 (N.M.); American Surety Co. v. Dick, 23 F. 2d 464*, etc.

Moreover, it is very important that King himself construed the contractual assumption of risk of the loss of equipment as including the time when special services were being performed and as being for the benefit of Dowell as well as Phillips, and so stated in his own testimony on the witness stand (R. 376-378).

Even if Dowell were not considered a third party beneficiary, the existence of the two indemnity contracts would preclude recovery here because Phillips is obligated to idem-

nify Dowell against any liability to King and, in turn, King is obligated to indemnify Phillips against such liability on its part, so that there would be a circuity of rights and remedies cancelling each other out in the net result. Any recovery by King against Dowell would entitle Dowell to recover over against Phillips, and Phillips against King. Of course, the subrogation insurance companies stand in the shoes of King and can have no better rights.

The indemnity contract from Phillips to Dowell is in language which would include indemnification even for its own negligence. It is well settled that an indemnity may be enforced in accordance with its own terms even though it provides indemnity against liability arising through negligence of the indemnitee. It is also now well established in New Mexico, as elsewhere, that an express reference to the indemnitee's own negligence is not necessary when the intent to cover all damages arising by reason of the work is clearly manifest. *Metropolitan Paving Co., Inc. v. Gordon Herkenhoff & Associates, Inc., 341 P. 2d 460 (1959).* See also *Stern v. Lorocco, 140 A. 2d 403; Griffiths v. Henry Broderick, Inc., 182 P. 2d 18; Fosson v. Ashland Oil & Refining Co., 309 S. W. 2d 176; Russell v. Shell Oil Co., 89 N. E. 2d 415; Buckeye Cotton Oil Co. v. Louisville & N. R. Co., 24 F. 2d 347; James Stewart & Co. v. Mobley, 282 S. W. 2d 290; Princemont Constr. Corp. v. Baltimore & Ohio Ry., 131 A. 2d 877; Rice v. Pennsylvania R. Co., 202 F. 2d 861; Mitchell's Inc. v. Freeman, 303 S. W. 2d 775 (1957);* etc.

The indemnity provision from Phillips to Dowell provides that "Dowell's liability for injury to person or property is

limited to that occasioned by its willful misconduct or failure to exercise good faith and customer shall secure Dowell against loss or damage not expressly accepted by Dowell." (R. 677.) The only loss or damage that is expressly accepted by Dowell is "that occasioned by its willful misconduct or failure to exercise good faith." Thus, loss occasioned by simple negligence of Dowell is not expressly accepted by it and therefore is within the indemnity from Phillips.

The King-Phillips contract not only provides that the contractor "assumes and bears all risk of accidents to persons and property which may occur in the course of contractor's operations hereunder" but also "to indemnify and hold owner harmless against or on account of all such accidents and damages." Certainly the accident and damage here occurred in the course of operations under the contract, and the language as to "all such accident and damages" clearly comes within the scope of the cases cited above. It is also to be noted that it is further provided for "*all risk and damage* to drilling tools, machinery, appliances, derrick or equipment *from whatever causes* shall be *at all times* assumed and borne by contractor."

Thus, if Dowell were negligent and thereby liable to King, Dowell would be entitled to indemnity from Phillips, and in turn Phillips would be entitled to indemnity from King, and this circuity of liability would prevent recovery.

The Court of Appeals does not pass on the indemnity provisions between Dowell and Phillips, merely saying that the parties are not the same, but we feel they are very

definitely involved and presented by the record and would prevent recovery because of the circuity of liability. Therefore, it is submitted that the Motion for Instructed Verdict was well taken and recovery was precluded on the grounds therein, so that even if there were any error in the charge it would have been harmless and immaterial and not reversible.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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By .....

PROOF OF SERVICE

I, Royal H. Brin, Jr., one of the attorneys for Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of , 1960, I served copy of the foregoing Petition for a Writ of Certiorari upon Respondents by mailing in a duly addressed envelope, air mail prepaid, to their attorney of record, John D. Robb, P. O. Box 558, Albuquerque, New Mexico.

.....

Attorney for Petitioners.
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APPENDIX

Opinion of Court of Appeals

This is an appeal from a judgment of the District Court of New Mexico on a jury verdict in a tort action by appellants against appellee Dowell, Inc., for loss or damage to its oil well drilling equipment caused by fire.

The basic facts are these. Tyler and King, doing business as King Drilling Company, contracted with Phillips Petroleum Company to drill and complete an oil well in New Mexico for a stipulated amount per vertical foot, and another agreed amount for work performed on a daily basis when not actually engaged in drilling operations. After the well had been drilled to the producing formation and virtually completed, and while the contractor was standing by on a day basis, Phillips arranged with appellee, Dowell, to sand frack the producing formation to increase productivity. This operation involved the injection of a mixture or blend of crude oil and sand into the producing formation under high pressure by means of pressure pumps, followed by injections of rubberized nylon balls to seal off the fractured formation. The oil-sand mixture entered the well through a frack head which is secured to the top of the blow-out preventer at the well head. The frack head comprises a cylinder with two-inch nipples screwed into its sides and valves attached to the outside of the nipples. After the oil and sand are mixed in a blender, it passes through flow lines to pressure pumps from which it is conveyed under high pressure through other flow lines

attached to the valves on the nipples. The mixture first passes through the valves, then through the nipples into the cylinder, thence into the well casing and to the bottom of the well hole where it is pressurized through perforations in the casing into the producing formation.

In our case, the fracking operation had been completed and the well hole was being washed under pressure with clean oil, when one of the nipples on the frack head failed, causing oil to spray in a radius of approximately 100 feet in about a 45 degree arc, within which area was located the pressure pumps about 80 feet distant from the well head, and the nylon-ball pumping truck approximately 60 feet. The spraying oil caught fire, causing the asserted loss. The contractor, King Drilling Co., sued Dowell, charging negligent conduct in the fracking operation. Dowell denied negligence and pleaded contributory negligence and assumption of risk, and by a third party action against Phillips, invoked an indemnity agreement, whereby Phillips agreed to "secure Dowell against loss or damage not expressly accepted by Dowell." Phillips thereupon counterclaimed against the contractor, pleading an assumption of risk and hold-harmless agreement with the contractor.

Before trial, Phillips and Dowell composed their differences and the trial court sustained Dowell's motion to make the contractor's insurance carrier a party plaintiff, apparently on the grounds that it had paid part of the loss and was therefore a necessary or real party in interest. The case went to the jury on the issues drawn between the contractor and its insurance carrier on the one hand, and

Dowell and Phillips on the other. The contractor objected to making the insurance company party plaintiff on the grounds that it had not actually paid any of the loss, but rather had merely entered into a loan agreement with the contractor by which it had advanced the contractor a stipulated sum of money to be repaid from the proceeds of this litigation.

The question under both New Mexico and federal law is whether by this transaction with its insured, the insurance company became a real party in interest, i.e., whether it is the owner or part owner of the right sought to be enforced. Selman v. Haddock, 310 P. 2d 1045; American Fidelity and Casualty Co. v. All American Bus Lines, 179 F. 2d 7; Gas Service Co. v. Hunt, 183 F. 2d 417; Celanese Corp. of America v. John Clark Industries, 214 F. 2d 551. Courts have generally sanctioned agreements between the insured and insurer, whereby the insurer advances a sum of money to its insured, to be repaid from the proceeds of an action against a tort-feasor. Western Spring Service Co. v. Andrew, 229 F. 2d 413; Celanese Corp. of America v. John Clark Industries, supra; Export Leaf Tobacco Co. v. American Insurance Co., 260 F. 2d 839. And, there is authority for saying that the insurer does not thereby become the owner of the right of action so as to make it the real party in interest. Augusta Broadcasting Co. v. United States, 170 F. 2d 199; 3 Moore Federal Practice, § 17.09, p. 1349.

The question is whether by the terms of the loan receipt in this case, the insurer actually became the subrogee of the insured, hence the real party in interest to the extent

of the "loan." The insured agreed to promptly present the claim, and if necessary prosecute a suit against the parties whose negligence or other fault caused the loss "with all due diligence in their own name." And, the insurer was furthermore given complete control of the litigation "with irrevocable power to collect any such claim or claims, and to begin, prosecute, compromise or withdraw * * * (in the name of the insured) any and all legal proceedings that the said company may deem necessary to enforce such claim or claims, and to execute in the name of the insured any documents that may be necessary to carry the same into effect for the purpose of this agreement." The nature of the "loan receipt" in Selman v. Haddock, supra, was not disclosed. But, there was testimony to the effect that it gave the insurer authority to "collect from who ever caused the damage if they could determine that." The New Mexico court construed this authority as giving the insurer an interest in the litigation which made it a necessary, even indispensable, party to the action against the tort-feasor. Evidently the trial court was of the view that what was in form a loan was in fact a payment of the loss and a subrogation of the claim to the extent thereof. Involving as it does a mixed question of state and federal procedural law, we adopt the decision of the trial court thereon. See Cities Service Oil Co. v. Adair, (10 CA), decided

, F. 2d .

Appellant also complains of Phillips' participation in the lawsuit, but again, we cannot say that Phillips did not have a litigable interest therein.

The contractor requested numerous instructions setting forth its theory of the factual and legal issues of negligence, all of which the trial court declined to give. At the conclusion of the court's instructions, the contractor renewed its request and objected to the refusal of the court to so instruct. It also objected to the submission of the assumption of risk and to the exclusion of evidence relating to the feasibility of the use of safer equipment by Dowell to rebut and impeach the testimony of one of Dowell's witnesses in that respect. Dowell and Phillips earnestly insist that they were entitled to a directed verdict upon the contractor's evidence. And, it goes without saying that if the contractor did not make out a case for the jury, it was not entitled to any instructions. Dowell and Phillips' theory is twofold. First, they invoke the provision in the drilling contract between the contractor and Phillips whereby the contractor agreed to "assume and bear all risk of accidents and damages to persons and property which may occur in the course of contractor's operations * * * and to indemnify and hold [Phillips] harmless against or on account of such accidents and damages." And further "all risks and damage to drilling tools, machinery, appliances, derricks or equipment from whatever causes shall at all times be assumed and borne by contractor * * *." They say that these provisions of the contract not only operated to save Phillips harmless from all risk of accidents and damages to persons and property which may occur in the course of the contractor's operations, but that it was also made and entered into for the benefit of Dowell, and operated to exonerate it from any liability to the contractor, even for its own negligence.

Applicable New Mexico law sanctions exculpatory clauses in contracts of this kind, whereby one party covenants to hold another harmless and to indemnify him against loss by his own negligence if, and only if, the intention to do so is "clear and unequivocal." Metrolopolitan Paving Co. v. Gordon Herkenhoff & Assoc., 341 P. 2d 460. And see also Fesson v. Ashland Oil & Refining Co., 309 S. W. 2d 176; Sinclair Prairie Oil Co. v. Thornley, 127 F. 2d 128; Standard Ins. Co. of N. Y. v. Ashland Oil & Refining Co., 186 F. 2d 44; Griffiths v. Henry Broderick, Inc., 182 P. 2d 18, 175 A.L.R. 1; Annot. 175 A.L.R. 8. And, we take it that the contracting parties may likewise contract for the benefit of a third party beneficiary, if the intention to do so is either expressed or manifestly implied. See Hamill v. Maryland Casualty Co., 209 F. 2d 338; Coleman v. Mountain Mesa Uranium Corp., 240 F. 2d 12; Johnson v. Armstrong & Armstrong, 66 P. 2d 992.

But, exculpatory clauses in contracts of this kind are not favorites of the law. They are strictly construed against the promisee and will not be enforced if the promisee enjoys a bargaining power superior to the promisor, as where the promisor is required to deal with the promisee on his own terms. Mohawk Drilling Co. v. McCullough Tool Co., (10 C. A.), decided October 7, 1959, F. 2d . Nor will a contract be enforced if it has the effect of exempting a party from negligence in the performance of a public duty, or where a public interest is involved. Hall v. Sinclair Refining Co., 89 S. E. 2d 396. The trend of modern decisions is toward further limitations on the rule which

sanctions such clauses in contracts like ours. And, it is derived "from a liberalization of the judicial concept of what constitutes sound public policy." Hall v. Sinclair Refining Co., supra. See also Mohawk Drilling Co. v. McCullough Tool Co., supra.

The drilling contract between the contractor and Phillips clearly and unequivocally bound the contractor to assume the risk of loss or damage to his equipment; and it also bound the contractor to hold Phillips harmless for any loss or damages which might occur in the course of the performance of the contract. From this "all embracing language," i.e. see Metropolitán Paving Co. v. Gordon Herkenkoff Assoc., supra, it is fair to say that the parties clearly intended to exempt and indemnify Phillips from any liability arising out of the performance of the contract, even against its own negligence. The drilling contract did contemplate that third parties would perform specialized services during the course of the contract. But that does not mean, nor do we think it can be fairly inferred, that Phillips intended to thereby insulate all such third parties from any liability for negligent conduct while performing the contemplated specialized services. It is clear that Phillips was concerned with self protection against risk of accidents or damages to persons or property occurring in the course of the contractor's performance of his contract. In other words, the contactor assumed the risk of his own operations and agreed to hold Phillips harmless therefor. We agree with the trial court that the parties to the drilling contract did not intend to save third parties like Dowell

harmless from their own negligent conduct, especially when they were in no way connected with the contractor's operations.

Dowell also invokes clauses in its rental receipt or lease agreement with Phillips, providing that "Dowell's liability for injury to person or damage to property is limited to that occasion by its own lawful misconduct or failure to exercise good faith, and customer (Phillips) shall secure Dowell against loss or damage not expressly accepted by Dowell." Dowell says in this connection that inasmuch as it is thus entitled to indemnity from Phillips for any liability to the contractor, and Phillips is absolved of any liability to the contractor, any recovery against Dowell would in reality be recovery against Phillips, and the contractor can therefore in no event prevail.

The validity of the exculpatory clauses in the Dowell-Phillips agreement is not before us, hence we have no occasion to decide whether the relative bargaining powers of the parties were such as to deny enforceability, i.e. Mohawk Drilling Co. v. McCullough Tool Co., supra. But in any event, we do not think the two contracts can be construed together to effect a circuity of rights and liabilities so as to exempt Dowell from any liability to the contractor for its own negligent conduct. In the first place, the drilling contract between Phillips and the contractor was entered into before the Dowell-Phillips agreement. Neither was in privy with the other; they were in no wise connected with respect to rights and duties to be imposed. Each stands

upon its own footing independently of the other. We agree with the trial court that Dowell was not contractually exempted from loss or damage to the contractor caused by Dowell's negligence.

This brings us to the appellant's objections and exceptions to the court's instructions. Either before or at the close of the evidence, both sides submitted extensive requested instructions, and they were discussed informally at a conference of court and counsel. After advising counsel concerning the instructions he proposed to give, the court proceeded to instruct the jury by abstractly defining preponderance of evidence, burden of proof, proximate cause, negligence, contributory negligence, unavoidable accident, and assumption of risk. The case was submitted to the jury without any instructions or statement concerning the legal or factual issues involved in the lawsuit.

After the instructions, and before the jury retired, each party objected to the court's instructions, generally stating the grounds therefor. And see Rule 51 F. R. C. P.; Downie v. Powers, 193 F. 2d 760. On appeal the appellants complain of the refusal of the court to give any of their requested instructions on their various theories of the case, and in giving abstract instructions on the subject of negligence in lieu thereof. Specifically, the appellants complain of the refusal of the court to advise the jury that in determining the question of Dowell's negligence, they had a right to consider whether or not its employees failed: (1) to take precautions commensurate with the nature of crude oil. (2) To use a frack head which was equipped with

a check valve to prevent the escape of oil or to use a nipple of sufficient size and strength or to adequately support the weight of the valve and other piping which was attached to the nipple. (3) To shut off the motor of the ball injector pumping truck or to remain at their stations and duties either before or after the nipple broke. (4) To place the ball injector pumping truck at a safe distance from the well head. (5) To make an adequate inspection or test of its nipples or a test of its lines and valves up to the valve adjacent to the frack head nipples. (6) To equip the ball injector pumping truck with controls permitting emergency immediate shut down. (7) To observe defendant's own safety instructions and regulations. It seems safe to say that there was competent evidence tending to support the legal and factual issues posed by these requested instructions. And, it is also true that the trial court failed and refused to instruct the jury on any of these issues.

It has always been the law governing jury trials in federal courts that "no court is bound to give instructions in the form and language in which they are asked. If those given sufficiently cover the case and are correct, the judgment will not be disturbed, whatever those may have been which were refused." Railway Co. v. McCarthy, 96 U. S. 258, 265. See also District of Columbia v. Woodbury, 136 U. S. 450; Thiringer v. Barlow, 205 F. 2d 476; Employers Liability Assurance Corp. v. Freeman, 229 F. 2d 547; Messer v. L. B. Foster Co., 254 F. 2d 412. Indeed, we know as a practical matter that most requested instructions are colored with the advocate's view of his client's cause, and

cannot fairly be given in the requested language. Downie v. Powers, supra. "Once the judge has made an accurate and correct charge, the extent of its amplifications must rest largely in his discretion." United States v. Bayer, 331 U. S. 532. See also Chicago, Rock Island & Pacific Railroad v. Emery, 233 F. 2d 848.

But even so, jury trials in federal courts are conducted as at common law when the Constitution was adopted, under which the judge is the governor of the trial, with the inescapable duty to fully and correctly instruct the jury on the applicable law of the case, and to guide, direct and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth. See Quercia v. United States, 289 U. S. 466; Herron v. Southern Pacific Co., 283 U. S. 91; Patton v. United States, 281 U. S. 276; Minner v. United States, 57 F. 2d 506; United States v. Marzano, 149 F. 2d 923; Billeci v. United States, 184 F. 2d 394, 24 A. L. R. 881. This duty is not fulfilled by mere abstract statements or legal definitions, but rather by a fair and impartial statement of the factual issues and the law applicable thereto. The instructions ought to be stated in logical sequence and in the common speech of man if they are to serve their traditional and constitutional purpose in our system of jurisprudence. See Downie v. Powers, supra. Indeed, the judge may go so far as to comment on complicated facts and issues, provided he makes it plain that the jury is the trier of the facts and that they are perfectly free to form their own opinion of the facts and apply them to the law of the case. See United

States v. Johnson, 319 U. S. 503, 519; Billeci v. United States, supra; Quercia v. United States, supra.

In our case, the issues were complicated and the evidence fraught with conflict. Confusion and doubt in the minds of the jury is evidenced by the fact that on two occasions they returned to the courtroom for clarification on the law of negligence; and on two other occasions the court undertook to further clarify the issues. After an "unfortunate" example on assumption of risk, the court confessed that he was "bogged down in his own morass." In these circumstances, we are convinced that the jury did not have a clear grasp of the triable issues and the law applicable thereto.

The appellants specifically complain of the submission of the defense of assumption of risk. They say that it was neither legally justified nor factually supported. The trial court finally instructed the jury that in this case the assumption of risk could not rest on contract, and indeed, there was no contractual relationship between the contractor and Dowell. They say further that the defense could rest only on a master and servant relationship, which admittedly does not exist in this case. "It seems to be quite generally understood that the doctrine of assumption of risk is confined to cases arising out of the relation of master and servant." Rutherford v. James, 270 P. 796. And see also Swift v. Schuster, 192 F. 2d 615; Sinclair Prairie Oil Co. v. Thornley, 127 F. 2d 128. On one occasion, when the jury sought additional instructions or clarification, they were interested in assumption of risk. And, the court redefined it as where one "freely, voluntarily and knowingly

manifests his assent to dangerous conduct, or to the creation or maintenance of a dangerous situation or condition, and voluntarily exposes himself to that danger, or when he knows, or in the exercise of ordinary care would know that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself or his property or remains or keeps his property within the area of danger."

The appellees seem to agree to the doubtful applicability of the assumption of risk in cases like ours. But, they say that the kindred doctrine of volenti non fit injuria is applicable and that the courts' instruction was in conformity therewith. Courts have difficulty drawing the fine line between assumption of risk, contributory negligence, and volenti non fit injuria, i.e. see Swift v. Schuster, supra. And certainly we should not expect the jury to be more discriminatory. Applying the law of Utah, we have recognized the applicability of volenti non fit injuria in non-contract and nonemployment relationship cases, and we have simply stated it as meaning that "one who voluntarily exposes himself or his property to a known or appreciated danger due to negligence of another may not recover for injuries sustained thereby." See Schuster, p. 617. See also Cummins v. Halliburton Oil Well Cementing Co., 319 S. W. 2d 379.

We are not certain whether New Mexico has recognized the doctrine of volenti non fit injuria separate and apart from assumption of risk and contributory negligence, or as a species of either or both of them. It does seem, however,

that the New Mexico court has recognized and adheres to the proposition that an intention and unreasonable exposure of one's self or his property to a danger created by the negligence of another is barred from recovering therefor. Snodgrass v. Turner Tourist Hotels, 109 P. 2d 775, citing 2 Restatement Torts, §466 on contributory negligence. In any event, the jury is entitled to know the legal difference, if any, between contributory negligence, assumption of risk and volenti non fit injuria, and particularly how they are to be applied to the facts in this case.

Since, in our judgment the case must be retried, we leave these fine distinctions involving local law to the trial court. We know of course that in any event, they are affirmative defenses to be proven as such. And, it seems to be an established fact that at the time of the fire and resultant loss, the contractor was standing by on a day basis. There is nothing to indicate that he in any way participated in the fracking operation, which was under the immediate control of Dowell and the general direction of Phillips. But it may be that as an experienced operator in the oil fields, the contractor should have appreciated the danger of exposure to the fracking operation and moved his equipment. On the other hand, the evidence is not clear whether he was free to move it or whether he was required to leave it for the completion of his contract after the fracking operation. These are matters in the first instance for the court and jury and we cannot say on this record whether an instruction on contributory negligence, assumption of risk or

volenti non fit injuria was improper, and we leave it for reconsideration on retrial.

Finally we come to the question whether the court erroneously excluded proffered evidence to the effect that Dowell changed the model and design of the nipples on its frack head after the accident. The general rule is that evidence of a change in conditions or proof or repairs made after an injury is inadmissible to prove antecedent negligence. See Annot. 170 A. L. R. 7; II Wigmore, 3d Ed., §283, p. 151. There are many exceptions to the rule, among which is the view that such evidence is admissible in rebuttal, or as going to the credibility of testimony of defense witnesses on the issues. Annot. 170 A. L. R. 7, supra, §III, p. 36. The appellants insist that such testimony was proffered and was admissible for that very purpose and no other.

On direct examination of Dowell's station manager, the contractor elicited from him the statement to the effect that it would not be feasible to have used an extra heavy nipple on the frack head in the place of one which failed, and the witness gave his reasons therefor. And, the same witness was interrogated concerning the feasibility of the use of a check valve in the frack head which would have shut off the backward flow of the oil when the nipple broke. The witness seemed to agree that the check valve in the frack head would have shut off the backward flow of the oil, but denied that it would have been feasible to use it in this case. The excluded testimony was offered in rebuttal to show that it was feasible to have used ehe larger nipple

and check valve, and we think the trial court might well have admitted this particular testimony for that limited purpose without invading the general exclusionary rule, or without impinging upon the substantive standard of ordinary care. Cf. Brigham Young University v. Lillywhite, 118 F. 2d 836. The witness whose testimony appellants sought to impeach or rebut was called by them but he was an adverse party—Dowell's station manager—under Rule 43(b) and it was permissible to "contradict and impeach him in all respects as if he had been called by the adverse party, * * *." Rule 43(b) F. R. C. P.

The judgment is reversed and the case remanded for a new trial in accordance with the views herein expressed.